IN THE COURT OF APPEALS FOR
MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 13912
vs.	:	T.C. Case No. 92-CR-2529
WILBUR EARL HARPER	:	
Defendant-Appellant	:	

OPINION

Rendered on the 12th day of August, 1994.

Mathias H. Heck, Jr., Prosecuting Attorney, Walter F. Ruf, Asst. Prosecuting Attorney, 41 N. Perry Street, Suite 315 – Appellate Division, Dayton, Ohio 45402, Atty. Reg. No. 0020045

Attorney for Plaintiff-Appellee

Victor A. Hodge, 367 W. Second Street, Suite 110, Dayton, Ohio 45402, Atty. Reg. No. 0007298

Attorney for Defendant-Appellant

GRADY, P.J.

Defendant Wilbur Earl Harper appeals from his convictions for Rape, Attempted Rape, and Kidnapping. Harper was sentenced to serve concurrent sentences on the Rape and Attempted Rape. The Kidnapping conviction

was merged with the conviction for Attempted Rape because they are allied offenses of similar import.

Harper's convictions were founded on the accusations of Temesha Watkins, who claimed that on September 8, 1992, Harper forced her into his car and compelled her to engage in sex with him. Watkins' claims were not corroborated by independent evidence.

Defendant-Appellant Harper presents four assignments of error, which are set out below.

I.

APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL AS A RESULT OF THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AT RECESSES AS REQUIRED BY R.C. 2945.34.

The Trial lasted two and one-half days. At the conclusion of the sessions on the first and second days, the court permitted the jurors to leave court until the next morning. On neither occasion did the court admonish the jury as required by R.C. 2945.34, which provides:

> If the jurors are permitted to separate during a trial, they shall be admonished by the court not to converse with, nor permit themselves to be addressed by any person, not to listen to any conversation on the subject of the trial, nor form or express any opinion thereon, until the case is finally submitted to them.

Defendant-Appellant Harper concedes that his trial counsel failed to object to the court's failure to comply with R.C. 2945.34, and that he has no evidence that any

juror behaved contrary to the rules incorporated in the statute. In that event, the court's failure does not constitute reversible error. *Wagner v. State* (1922), 104 Ohio St. 38. *State v. Williams* (1974), 39 Ohio St.2d 20.

The first assignment of error is overruled.

II.

APPELLANT'S CONVICTION IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

In reviewing either the weight or sufficiency of the evidence supporting a criminal conviction, the same test is applied. Our function is to examine the evidence admitted at trial and to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Id.* An appellate court abuses its discretion by substituting its judgment for that of the trier of fact as to the credibility of witnesses. *State v. Walker* (1978), 55 Ohio St.2d 208.

Temesha Watkins testified that on September 8, 1992, a man seated in an automobile parked in a lot off Norman Avenue, in Dayton, called to her as she walked past, on her way home from school. The man asked whether she had change for a quarter. Watkins got out the change. The man motioned to her to come to the passenger side of the car. When she did, the man opened the front passenger

door, grabbed her wrist, and told her in a deep voice to get in. She complied.

Once she was in the car, the man began making sexual overtures to Watkins, and told her that if she massaged his thigh he would let her go. When she did, the man moved her hand to his penis, to rub it. He removed his penis from his trousers and asked Watkins to perform Fellatio. She refused. He then grabbed the back of her head and forced her to.

After releasing his grip on Watkins head, the man started the car and drove to another location, in an alley near Salem Avenue. He put Watkins in the back seat, locked the car, and engaged in sexual intercourse with her. Afterwards, the man drove to Catalpa and Fairview, where he released Watkins.

As her assailant drove away, Watkins took note of the license number on the car. Watkins walked into a drive-through on the corner, crying. Her mother was called, and took her home. Watkins and her mother were later interviewed by police. Watkins was also examined by a physician.

Police took a report form [sic] Watkins, who gave a description of her assailant, whom she did not know. She also described his car, red, four door Maxima sedan, and gave police its license number. Defendant Harper was apparently connected to the crime through his car.

Temesha Watkins was fifteen years old when these events occurred. Defendant Harper, whom Watkins identified through a photospread and in open court at trial as her assailant, was thirty years old at the time.

Defendant Harper testified and denied any contact with Watkins. He claimed that he had worked on that day, and that he went directly home after work.

A physician who had examined Watkins after the alleged rape testified that she found no evidence of sexual activity. A police detective assigned to the Miami Valley Regional Crime Laboratory testified that the sexual assault kit used by that office reflected negative results for semen and/or sperm tests.

Defendant-Appellant Harper argues that Watkins' testimony was somewhat contradictory on several points. She described the car as being "red", and on another occasion as "maroon", and at trial as "burgundy" in color. Also, she told police that her assailant had a beard, but later said that he had a "shadow" of facial hair. The sequence of events and some of the particulars of the sexual assaults alleged also varied somewhat. These discrepancies, along with the lack of any independent physical evidence, render her testimony less than credible, according to Appellant Harper.

One-on-one allegations of this kind must be given careful scrutiny, and we have no reason to doubt that juries do that. The claimed discrepancies, if they have any force at all, go to the credibility of Watkins' testimony. That is an issue for the jury, not for an appellate court on review. *State v. DeHass* (1967), 10 Ohio St.2d 230.

The jury must resolve any conflicts in deciding whether to believe a witness. The jury apparently found any conflicts in Watkins' story insubstantial, for it chose to believe Watkins story and reject the Defendant's. We

may not interfere with that determination, even were we to believe that the jury was mistaken.

Defendant-Appellant Harper also argues that hearsay evidence given by a police officer concerning what Watkins' mother told the officer about Watkins' statements to her undermine the verdict. However, no objection was made to this evidence, and for purposes of appeal all error arising from it, other than plain error, is waived. *State v. Williams* (1977), 51 Ohio St.2d 112. "Plain error" does not exist unless it can be said that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91. We cannot find that to be the case here.

Finally, Defendant-Appellant argues that the evidence of force was insufficient to support convictions for Rape and Attempted Rape. We do not agree.

Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A). The force necessary for Rape does not require a direct or violent act, and it need not be physically overwhelming. It can be compelling, subtle, or psychological. If the victim's will was overpowered by force or duress, the force element of Rape is established. In weighing that evidence, the jury may look to the relative age, size, and strength of the persons involved. *State v. Eskridge* (1988), 38 Ohio St.3d 56.

The record demonstrates that Temesha Watkins was fifteen years old when the offense occurred. Defendant Harper was thirty years of age. He used force to pull her into his car, to hold her head in fellatio, and in locking

her into the car during sexual intercourse. The proof of force was not insufficient.

The second assignment of error is overruled.

III.

APPELLANT WAS DENIED A FAIR TRIAL AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant-appellant argues that his trial counsel provided constitutionally ineffective assistance because he (1) failed to move to suppress the photospread from which Watkins identified him and (2) failed to object to the police officer's hearsay evidence, which was discussed above.

In *State v. Bradley* (1989), 42 Ohio St.3d 136, the Supreme Court held, at Syllabii 2 and 3:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* (1976), 48 Ohio St.2d 391, 2 0.0.3d 495, 358 N.E.2d 623; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

Defendant-Appellant argues that a motion to suppress the photospread identification was proper because Watkins had first said that her assailant had a full beard, while the photos used were of men, including Harper, who were without facial hair. However, officers suspected Harper based on other information, which connected him to the offense through his car. We see no basis to suppress the photospread identification for the reasons suggested.

We agree that the police officer's testimony introduced hearsay-on-hearsay, and that it was objectionable. However, it varied from Watkins' later trial testimony, and defense counsel may have wished to have the jury hear it in order to argue that Watkins told conflicting versions of what had happened to her. A strong presumption operates in favor of trial counsel's adequate performance, and trial counsel is afforded considerable latitude in making tactical choices. *Strickland v. Washington, supra.* There is sufficient reason to conclude that is what occurred here.

The third assignment of error is overruled.

IV.

APPELLANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE CUMULATIVE EFFECT OF ERRORS.

The only error we have found was in admission of the police officer's double-hearsay testimony. We do not

find this error sufficiently serious to have denied Appellant his right to a fair trial.

The fourth assignment of error is overruled.

V.

Having overruled all the assignments of error, we will affirm the judgment of the trial court.

FAIN, J. and KERNS, J., concur.

(Judge Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District, sitting by Assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

Walter F. Ruf, Esq.
Victor A. Hodge, Esq.
Hon. Lee A. Bixler
Hon. John W. Kessler

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WILBUR EARL HARPER	:	
Defendant-Appellant	:	**FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 12th day of August, 1994, the judgment of the trial court is Affirmed.

/s/ Thomas J. Grady
THOMAS J. GRADY,
PRESIDING JUDGE

/s/ Mike Fain
MIKE FAIN, JUDGE

/s/ Joseph D. Kerns
JOSEPH D. KERNS, JUDGE

(Judge Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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The Supreme Court of Ohio

1995 TERM

To wit: January 18, 1995

State of Ohio, Appellee,	:	Case No. 94-2032
v.	:	ENTRY
Wilbur Earl Harper, Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Victor A. Hodge.

(Montgomery County Court of Appeals; No. 13912)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice